

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NORBERT H. O'BRIEN	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1987	:	
through July 26, 1988.	:	

Petitioner, Norbert H. O'Brien, 4170 David Road, Williamsville, New York 14221, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1987 through July 26, 1988 (File No. 807505).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on November 2, 1990 at 9:00 A.M., with all briefs to be submitted by January 23, 1991. Petitioner appeared by Robert E. Knoer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly assessed petitioner, a bulk sale purchaser, for the unpaid sales tax due from the bulk sale seller where, except for a small amount of cash transferred at closing, the consideration paid consisted of payment (and discharge) of existing tax liens, judgments, property tax assessments and assumption or discharge of mortgages.

FINDINGS OF FACT

Stipulated Facts

Prior to the commencement of the hearing in this matter, the duly authorized representatives of the parties entered into a stipulation of facts. This stipulation, modified only for style, is set forth hereinafter.

For a short period of time thereafter, John and Katherine Hope continued to operate as John and Katherine Hope d/b/a the Wilson House, paying rental for the use of the property to petitioner, Norbert H. O'Brien.

"CLOSING STATEMENT

PURCHASE PRICE	\$165,000.00
1988 County Tax - 1031.98 : 2.83 day x 158 days	447.14
TOTAL AMOUNT DUE	
SELLER	\$165,447.14

Amount Paid Down	3,000.00
Village Tax 1988-89 \$665.80	
\$1.82 per diem x 56 days = \$101.92	
+ late fees 47.17	149.09
July Rent \$2,500.00 \$80.65 per diem x 5 days	403.25
1987-88 School & County Taxes + late fees	3,121.63
School Tax 1988-89 \$1,845.13 \$5.06 per diem x30 days	151.80
Back Water (included in 88-89 Village Tax)	277.64
Village Water Bill to 07/26/88	499.85
Escrow for Heating Contractor's Judgment	10,000.00
NORSTAR Bank Mortgage \$59,998.44 + interest	60,100.67

¹The Closing Statement was attached to petitioner's petition and was incorporated into the stipulation by reference.

NASH Mortgage	53,000.00
Judgments (2) \$1,440.59 \$999.62	2,440.21
Closing Costs Assumed by Purchaser:	
NYS Transfer Tax-----	236.00
Mortgage Discharge-----	8.00
Nash Affidavit-----	8.00
Norstar Legal Fees-----	35.00
TOTAL	287.00

TOTAL-----\$133,431.11

State Tax Liens

	<u>Lien Amount</u>	<u>Settlement Amount</u>
#22104	\$1,617.95	\$1,804.84
#22431	5,957.49	6,170.02
#22430	1,585.59	1,608.85
TOTAL		\$9,583.71

FEDERAL TAX LIENS

	<u>Lien Amount</u>	<u>Settlement Amount</u>
#8928	5,491.43	\$ 5,491.43
#16853978	35,105.84	14,019.48
Interest		373.10
TOTAL		\$19,884.21
TOTAL TO DISCHARGE TAX LIENS-----		\$29,476.92

TOTAL CREDIT TO
PURCHASER \$162,908.03

TOTAL AMOUNT DUE SELLER-----\$165,447.14
TOTAL CREDIT TO PURCHASER-----\$162,908.03
BALANCE DUE ON CLOSING \$
2,539.11"

The Closing Statement accurately reflects that total cash paid to Sellers John M. and Katherine A. Hope following the closing was \$2,539.11.

A Notification of Sale, Transfer, or Assignment in Bulk addressed to the Central Office Audit Bureau, Sales Tax Section was forwarded by regular mail with a post-metered date of July 29, 1988 and received by the Division of Taxation on August 2, 1988.

On August 5, 1988, pursuant to Tax Law § 1141(c), the Division of Taxation sent a Notice of Claim to petitioner as a "Bulk Sale Purchaser". The Notice of Claim informed petitioner of the outstanding liability for unpaid taxes due from the Seller.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S881031709C, dated 10/31/88) was issued to petitioner, as a "bulk sale purchaser",

asserting sales tax due based upon the seller's unpaid sales tax. The taxes due from the seller resulted from returns filed without remittance for the periods ended 11/30/87, 2/29/88, 5/31/88, and 7/26/88 for a total tax due of \$15,888.18 plus \$2,800.00 in tax due on the sale of tangible personal property transferred in the bulk sale to petitioner.

Pursuant to a Conciliation Order issued on September 1, 1989, by the Bureau of Conciliation and Mediation Services, Notice No. S881031709C was recomputed and reduced to the amount of \$7,761.60 because payments had been made on behalf of the bulk sale seller. [The tax which remains at issue constitutes the seller's unpaid sales tax liability for the periods ended 5/31/88 and 7/26/88.]

Petitioner has previously paid all monies claimed to be due and owing by the Department of Taxation and Finance arising out of Notice No. S881031709C.

Petitioner now seeks reimbursement of the monies paid.

CONCLUSIONS OF LAW

A. Section 1141(c) of the Tax Law provides, in pertinent part, as follows:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof whether or not the seller, transferrer or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

Whenever the purchaser, transferee or assignee shall fail to give notice to the tax commission as required by the preceding paragraph, or whenever the tax commission shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim.... For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code, shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferrer

or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article."

B. In the instant matter, petitioner, as bulk sale purchaser, clearly failed to comply with the provisions of Tax Law § 1141(c). Specifically, petitioner failed to timely file with the Division of Taxation his Notification of Sale, Transfer or Assignment in Bulk. This filing occurred subsequent to the sale and not at least 10 days prior thereto as required by the statute. Also, petitioner transferred money and other consideration (e.g., payment of property taxes, discharge or assumption of mortgages, discharge of tax liens [see Conclusion of Law "C", below]) to the seller in contravention of the express provision of the statute. Given this failure to comply with Tax Law § 1141(c), petitioner became personally liable for taxes due from the seller. The Division's assessment of such taxes against petitioner was therefore proper.

C. The parties did not address petitioner's failure to comply with Tax Law § 1141(c) as discussed above. Rather, the issue contested by the parties centered upon whether the non-cash consideration paid by petitioner to the seller constituted "other consideration" subject to the State's first priority right and lien under Tax Law § 1141(c). Petitioner contended that since the real property transferred in the bulk sale was, at the time of the sale, encumbered with liens superior to any Division claim for the taxes at issue, the only monies to which the Division's lien could have attached would have been the \$2,539.11 which was transferred to the seller at the closing. This contention is rejected. As the Division correctly notes, the "first priority right and lien" referred to in section 1141(c) is on the consideration passing to the seller as a result of the sale. It is not a lien on real property. It is therefore of no moment that the real property in question was encumbered by such liens. Essentially, petitioner seeks to limit his liability for the seller's taxes based upon the types of consideration given for the property. Under Tax Law § 1141(c), however, such liability is limited only by the amount of consideration given, i.e., fair market value or purchase price, whichever is higher (see, Spandau v. United States, 72 NY2d 832, 537 NYS2d 120).

D. The petition of Norbert H. O'Brien is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated October 31, 1988, as modified by the Conciliation Order, issued September 1, 1989, is sustained.

DATED: Troy, New York

7/3/91

ADMINISTRATIVE LAW JUDGE